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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SAM REHDER,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The complete rejection of any alibi theory-of-defense instructions by the State of Illinois, even in the face of substantial defense alibi evidence, stands in clear conflict with an overwhelming majority of lower federal court and State court decisions. This Court has not spoken to this issue.

The question presented is whether the Illinois blanket rejection of any alibi theory-of-defense instruction violated petitioner's Due Process Clause guarantees as established in the Fifth and Fourteenth Amendments, and his Sixth Amendment right to a jury trial?

PARTIES TO THE PROCEEDING

Sam Rehder is the petitioner. He appears herein through retained counsel, Allan A. Ackerman, 2000 North Clifton Avenue, Chicago, Illinois, 60614, (312) 332-2891.

Respondent is the State of Illinois through Attorney General James Ryan, 100 East Randolph Street, 12th Floor, Chicago, Illinois, 60601, (312) 814-3000.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 1

STATEMENT OF THE CASE 2

A. Course of Proceedings and Disposition Below 2

B. Statement of the Facts 3

REASONS FOR GRANTING THE PETITION 6

The complete rejection of alibi theory-of-defense instructions by the State of Illinois conflicts with decisions of the lower federal courts and an overwhelming majority of state courts. This Court has not spoken to the issue.

The question presented is whether the Illinois blanket rejection violates petitioner's Fifth Amendment Due Process Clause right to a theory-of-defense instruction and his Sixth Amendment right to a jury trial? 6

A. This Court's theory of defense precedent 6

B. The majority of federal circuits hold that the failure to give an alibi jury instruction is prejudicial error 9

C. The majority of state jurisdictions hold that the failure to give an alibi jury instruction is prejudicial error 12

D. The State of Illinois and alibi jury instructions 16

E. The circuits are divided on the question of whether the failure to provide an alibi defense rises to the level of federal constitutional error 18

CONCLUSION 23

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases	PAGE(S)
Brooks v. Alabama, 380 So.2d 1012 (1980)	12
Brown v. Georgia, 122 Ga.App. 470, 177 S.E.2d 509 (1970)	12
California v. Ratliff, 41 Cal.3d 675, 224 Cal.Rptr. 705, 715 P.2d 665 (1986)	12
Colorado v. Nunez, 841 P.2d 261 (Colo. Sup.Ct., 1992)	12
Commonwealth of Pennsylvania v. Roxberry, 529 Pa. 160, 602 A.2d 826 (Pa. Sup.Ct., 1992)	15
Commonwealth v. Medina and Soto, 404 N.E.2d 1228 (1980)	13
Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995)	19
Duckett v. Nevada, 104 Nev. 6, 752 P.2d 752 (1988)	14, 21
Giesberg v. Texas, 945 S.W.2d 120, Texas Ct.Crim.App., No. 696-97 (1998 WL 670415; 9/30/98); *cert. denied*, 119 S.Ct. 1044 (1999)	15
Goldsby v. United States, 160 U.S. 70, 16 S.Ct. 216 (1895)	6

Holmes v. Mississippi, 481 So.2d 319 (Miss. 1985) 13

Hudson v. Florida, 381 So.2d 344 (1980) 12

Iowa v. Stump, 254 Io. 1181, 119 N.W.2d 210 (Iowa Sup.Ct., 1963) 13

Jennings v. Indiana, 514 N.E.2d 836 (Ind. Sup.Ct., 1987) 13

Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969) 11, 13, 18

Johnson v. Bennett, 393 U.S. 253, 89 S.Ct. 436 (1968) 7

Jones v. Texas, 398 S.W.2d 753 (Tex. 1966) 15

Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883 (1988) 8

Michigan v. McGinnis, 402 Mich. 343, 262 N.W.2d 669 (Mich. Sup.Ct., 1978) 13

Nebraska v. El-Tabech, 225 Neb. 395, 405 N.W.2d 585 (1985) 13

New Jersey v. Garvin, 44 N.J. 268, 208 A.2d 402 (1965) 1

New Jersey v. Searles, 82 N.J. Supr. 210, 197 A.2d 384 (App.Div., 1964) 14

New York v. Jack, 74 N.Y.2d 708, 541 N.E.2d 410 (C.A.N.Y. 1989) 14

North Carolina v. Hunt, 283 N.C. 617,
197 S.E.2d 513 (1973) 14

Ohio v. Bridgeman, 51 Oh.App.2d 105,
366 N.E.2d 1378, 90 P.2d 665 (1986) 14

People v. Pearson, 19 Ill.2d 609,
169 N.E.2d 252 (1960) 16-17

People v. Poe, 48 Ill.2d 506,
272 N.E.2d 28 (1971) 17

People v. Scott, 401 Ill. 80,
81 N.E.2d 426 (1948) 16

Poe v. Tennessee, 212 Tenn. 413,
370 S.W.2d 488 (1963) 15

Robertson v. Maryland, 111 Md.App. 366,
685 A.2d 805 (1996) 13

South Carolina v. Bealin, 201 S.C. 490,
23 S.E.2d 746 (S.C.Sup. Ct. 1943) 15

Stevenson v. United States, 162 U.S. 313,
16 S.Ct. 839 (1896) 7

Stump v. Bennett, 398 F.2d 111
(8th Cir. 1968) 7

Sullivan v. Louisiana, 508 U.S. 275 (1993) 20

Taylor v. Kentucky, 436 U.S. 478,
98 S.Ct. 1930 (1978) 8, 22

Trissell v. Oklahoma, 737 P.2d 1228 (Okl. Cr., 1987) 14

United States v. Alston, 551 F.2d 315 (D.C. Cir. 1976) 9

United States v. Barrasso, 267 F.2d 908 (3rd Cir. 1959) 10

United States v. Booz, 451 F.2d 719 (3rd Cir. 1971), *cert. denied*, 414 U.S. 820, 94 S.Ct. 45 (1973) 22

United States v. Burse, 531 F.2d 1151 (2nd Cir. 1976) 9

United States v. Douglas, 818 F.2d 1317 (7th Cir. 1987) 18

United States v. Gaudin, 515 U.S. 506 (1995) 20, 21

United States v. Hamilton, 684 F.2d 380 (6th Cir. 1982) 10

United States v. Harston, 64 F.3d 491 (9th Cir. 1995) 11

United States v. Hicks, 748 F.2d 854 (4th Cir. 1984) 10, 18, 19

United States v. Kwong, 69 F.3d 663 (2nd Cir. 1995) 9

United States v. Marcus, 166 F.2d 497 (3rd Cir. 1948) 10

United States v. Megna, 450 F.2d 511 (5th Cir. 1971) 10

United States v. McCall, 85 F.3d 1193 (6th Cir. 1996) 10

United States v. Simon, 995 F.2d 1236 (3rd Cir. 1993) 10, 18-19

United States v. Webster, 769 F.2d 487 (8th Cir. 1985) 11

United States v. Zuniga, 6 F.3d 569 (9th Cir. 1993) 11, 21

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973) 7

Washington v. Pam, 1 Wash. App. 723, 463 P.2d 200 (1970) 15

Williams v. Florida, 395 So.2d 1236 (Fla. 1981) 12

Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893 (1970) 7

Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884 (1991) 19

United States Constitution

United States Constitution:

Fifth Amendment ..... *passim*

Sixth Amendment ..... *passim*

Fourteenth Amendment ..... i, 2, 17, 18

Federal Statutes

28 U.S.C. Section 1257(a) 1

State Statutes

Ill. 720 ILCS 5/3-2(b) 21

Other Authorities

Wright, *Federal Practice and Procedure*, 2 ed. at § 491 (West. 1982) 9

Devitt, Blackmar, Wolff and O'Malley, *Federal Jury Practice and Instructions*, 4th ed. at § 19.07 (West. 1992) 11

1968 and 1992 Illinois Pattern Jury Committee Comments ..... 17; App. 23

PETITION FOR WRIT OF CERTIORARI

Sam Rehder, petitioner, by his attorney, Allan A. Ackerman, requests that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court, First District, entered on June 17, 1998 in *Illinois v. Sam Rehder.*

OPINION BELOW

The unpublished opinion of the Illinois Appellate Court, First District, is unreported and is reproduced at App. 1-18, *infra*. Petitioner's timely petition for Illinois Supreme Court review was denied on February 3, 1999, App. 19, *infra*.

JURISDICTION

The Appellate Court of Illinois, First District, affirmed petitioner's conviction and sentence on June 17, 1998. The Illinois Supreme Court declined review on February 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution, in part, states:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

The Sixth Amendment to the U.S. Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the U.S. Constitution, in part, states:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case squarely raises the important and unresolved issue of whether the State of Illinois, without transgressing the Fifth, Sixth and Fourteenth Amendments, can deprive a criminal defendant of an alibi theory-of-defense instruction as a matter of Illinois policy. Several federal circuits and most state jurisdictions hold that where a criminal defendant presents some alibi evidence, the trial court *must* provide the deliberating jury with an alibi instruction.

A. *Course of Proceedings and Disposition Below*

On June 28, 1989, petitioner was indicted for first-degree murder by the Cook County, Illinois, grand jury

(C-13-15). Petitioner was granted bail pending trial and was represented by retained counsel. His jury trial commenced on September 23, 1991, and culminated in a guilty verdict on September 27, 1991. Petitioner's bail was immediately revoked and he remains in custody.

On November 21, 1991, petitioner, age 21, was sentenced to a forty-five year custodial sentence. Petitioner's conviction and sentence was affirmed on direct appeal to the Illinois Appellate Court, First District. The Illinois Supreme Court declined review. This petition is from the Illinois Appellate Court's affirmance on petitioner's direct appeal.

B. *Statement of the Facts*

The facts undergirding this certiorari petition are, in large part, undisputed. On April 15, 1989, at approximately 10:15 p.m., at the intersection of Lexington and Kostner in Chicago, Anthony Logan was the victim of a shooting. Trial facts disclosed that there were several Afro-American members of the Gangster Disciples street gang gathered at Lexington and Kostner (Tr. 380, 464-473). Because of ongoing street repairs, the traffic flow was frequently interrupted. At approximately 10:15 p.m., two cars were stopped at that intersection. One of the cars was allegedly driven by petitioner (Tr. 80, 385-87). Individuals in the two temporarily halted cars began "throwing up gang signs" which were recognized as being members of the "Latin Kings" (Tr. 385-87). According to prosecution witnesses, petitioner exited one of the traffic-bound cars and exchanged words with the Lexington-Kostner throng. The corner gang members threw bottles at the petitioner, who then

retrieved a pistol and shot into the crowd, killing Anthony Logan (Tr. 390-91, 669-676).

On May 23, 1989, petitioner was arrested on the west side of Chicago (Tr. 680-83). Cross-racial line-ups ensued and petitioner was identified by two of the Lexington-Kostner group as the shooter (Tr. 394, 479-80).

Petitioner's defense was *alibi*. Testimony and exhibits established that on April 15, 1989 at 8:00 p.m. and throughout the balance of that evening, he was home with his mother, brother, sister and uncle preparing federal income tax returns: testimony of his mother, Annette Rehder (Tr. 863, 865-71); testimony of his eldest sister, Denise Ryan (Tr. 909-14) (when she left the family abode to mail the tax returns at approximately 11:00 p.m. petitioner was at home with the family); testimony of his eldest brother, Richard Rehder (petitioner was at home from 8 p.m. until when Richard departed the family abode around midnight on April 15, Tr. 940-43). In addition, copies of the tax returns prepared on that date were admitted as Defense Exhibit one-three (Tr. 989).

After the close of evidence, the trial court conducted a jury instruction conference. Petitioner's trial counsel submitted alibi theory-of-defense instructions (Tr. 1016-19). One of the rejected alibi instructions was taken directly from an approved Seventh Circuit Alibi Pattern Instruction, which reads:

> Evidence has been introduced that the defendant was not present at the time and place where the crime charged in the indictment is alleged to have been committed. The government has the burden of establishing beyond a

> reasonable doubt the defendant's presence at that time and place.

Seventh Circuit Pattern Instruction, § 4.03 (1980) (Org. Rec. C-136).

The trial court, rejecting petitioner's *alibi* theory of defense instructions, noted:

> ". . . if there's some new law to be made, maybe this is a case you can make it in" (Tr. 1019).

The trial jury received no instruction regarding petitioner's sole theory of defense: *alibi*. On September 27, 1991, after summations and instructions, the jury returned a first-degree murder guilty verdict (Tr. 1075). On November 21, 1991, petitioner, a first-offender, was sentenced to forty-five years in custody (Tr. 1127).

3. Petitioner's original appellate counsel failed to file an opening brief and the Illinois Appellate Court, First District, dismissed petitioner's appeal for want of prosecution on January 25, 1993. With the benefit of new appellate counsel, his appeal was reinstated and on June 17, 1998, after plenary briefing and oral argument, petitioner's conviction was affirmed. App. 1-18, *infra*. The appellate court rejected petitioner's alibi instruction plaints based upon its assumption that because the Illinois Committee on Illinois Pattern Instructions "recommended" against the giving of an alibi instruction, the trial court was correct in rejecting petitioner's alibi theory of defense instruction. App. 9-10, *infra*.

Petitioner's timely request for Illinois Supreme Court review, which incorporated federal constitutional authorities and argument in support of an alibi instruction, was denied on February 3, 1999. App. 19, *infra*.

REASONS FOR GRANTING THE PETITION

The complete rejection of alibi theory-of-defense instructions by the State of Illinois conflicts with decisions of the lower federal courts and an overwhelming majority of state courts. The Illinois blanket rejection unquestionably violates petitioner's Fifth Amendment Due Process Clause right to a theory of defense instruction and his Sixth Amendment right to a jury trial. Since the Court has not spoken directly to the issue, this petition presents the appropriate vehicle for definitively resolving whether federal constitutional error flows from the total absence of an alibi theory-of-defense instruction, where alibi represented the defendant's sole defense, and the trial evidence clearly warranted such an instruction.

A. THIS COURT'S THEORY OF DEFENSE PRECEDENT.

Over five-score years ago, the Court briefly considered alibi instructions in a homicide prosecution. In *Goldsby v. United States*, 160 U.S. 70, 77, 16 S.Ct. 216, 219 (1895), the Court visited the failure to provide *Goldsby's* jury with an alibi instruction. While affirming *Goldsby's* conviction, Justice White explained:

> If the accused wished specific charges to the weight in law to be attached to testimony introduced to establish an alibi, it was his privilege to request the court to give them. No such request was made, and therefore the assignments of error are without merit.

160 U.S. at 77.

Petitioner's research disclosed a second Court decision arguably impacting on alibi instructions. In *Johnson v. Bennett*, 393 U.S. 253, 89 S.Ct. 436 (1968), the Court vacated the denial of habeas corpus relief and remanded for Eighth Circuit resolution the question of whether an Iowa alibi instruction impermissibly placed the burden of proof on the defendant. On remand, the Eighth Circuit, sitting *en banc*, held that an alibi instruction which placed the burden of proof on the defendant violated the Due Process Clause of the Fourteenth Amendment, *Stump v. Bennett*, 398 F.2d 111, 113-17 (8th Cir. 1968) (*en banc*).[1]

It has long been held that a defendant in a criminal case has the right to have his theory of the case submitted to the jury. For example, in *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 842 (1896), the Court reversed *Stevenson's* murder conviction because the trial court declined to submit his theory of defense (manslaughter) for petit jury consideration. The Court noted that the jury might reject the defense, ". . . But why should the other [manslaughter] issue be taken from the jury, and they not be permitted to pass upon it as upon a question of fact?" *Id.*

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[1] In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970) and *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973), the Court reviewed the constitutionality *vel non* of reciprocal notice-of-alibi discovery rules. In *Williams*, the Florida notice-of-alibi rules were valid based on the availability of extensive reciprocal discovery. In *Wardius*, the Oregon rules were held invalid because they were one-sided in favor of the prosecution. Neither case considered the blanket prohibition against alibi jury instructions.

Chief Justice Rehnquist authored the reversing opinion in *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883 (1988). In *Mathews*, the trial court refused to instruct the jury regarding entrapment because the defendant eschewed admitting all the elements of the charged drug offenses, 485 U.S. at 62-63. While explaining that inconsistent defenses were authorized in criminal cases, the Chief Justice noted:

> As a general proposition a defendant is entitled to an instruction as to any *recognized defense* for which there exists evidence sufficient for a reasonable jury to find in his favor.

485 U.S. at 63 (emphasis added, supporting authorities omitted).

The respondent may argue that the absence of an alibi instruction did not preclude petitioner's trial counsel from arguing his alibi. Surely, that is true. But in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978), the Court reversed a criminal conviction, finding that the failure to give a specific presumption of innocence instruction violated *Taylor's* right to a fair trial. Justice Powell explained:

> The Commonwealth also contends that no additional instructions were required, because defense counsel argued the presumption of innocence in both his opening and closing statements. *But arguments of counsel cannot substitute for instructions by the court.*

436 U.S. at 488-89 (emphasis added).

Petitioner asserts that a blending of the Court's cases (*Goldsby, Stevenson, Mathews* and *Taylor*), discloses a clear bias *in favor* of providing the criminally accused

with the benefit of a theory-of-defense jury instruction—including alibi.[2]

B. THE MAJORITY OF FEDERAL CIRCUITS HOLD THAT THE FAILURE TO GIVE AN ALIBI JURY INSTRUCTION IS PREJUDICIAL ERROR.

The federal circuits consistently hold that the failure to provide an alibi instruction, when supported by even inconsistent evidence, rises to the level of prejudicial error:

1. *D.C. Circuit*: *United States v. Alston*, 551 F.2d 315, 318-20 (D.C. Cir. 1976) (reversing armed robbery where trial court failed to place burden of proof on the government on all issues, including alibi within the fabric of the jury instruction in that case).

2. *Second Circuit*: *United States v. Burse*, 531 F.2d 1151, 1153 (2nd Cir. 1976) (reversing conspiracy to rob a federally insured bank while noting it is ". . . well established that, under proper circumstances, the jury must be given an alibi instruction when the defendant so requests."); *United States v. Kwong*, 69 F.3d 663, 667 (2nd Cir. 1995) ([but] the trial court may refuse to give an alibi instruction however, where the alleged alibi evidence is not inconsistent with guilt).

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[2] See Wright, *Federal Practice and Procedure*, 2 ed. at § 491 at pp. 757-58 (West. 1982) ("On request of the defendant, the jury should be instructed that the government's burden of proof covers the defense of alibi, as well as other phases of the case. It should be made clear that this burden remains on the government even though the jury disbelieves the alibi witnesses. It is not error to fail to give an alibi instruction, however, in the absence of a request for the instruction").

3. *Third Circuit*: *United States v. Marcus*, 166 F.2d 497, 503-04 (3rd Cir. 1948) (reversing federal bribery conviction, explaining ". . . if the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case."); *United States v. Barrasso*, 267 F.2d 908, 910 (3rd Cir. 1959) (same); *United States v. Simon*, 995 F.2d 1236, 1244 (3rd Cir. 1993) (". . . in the special case of an alibi defense the jury charge on alibi must include a specific instruction setting forth the government's burden of proof").

4. *Fourth Circuit*: *United States v. Hicks*, 748 F.2d 854, 857-58 (4th Cir. 1984) (reversing for failure to instruct on alibi, explaining that ". . . Hicks had a Sixth Amendment and due process right to have that issue submitted to a jury * * * Failing to give the jury an alibi instruction was thus an error of constitutional magnitude . . . .").

5. *Fifth Circuit*: *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971) (failure to give an alibi instruction compelled conviction vacation in federal theft prosecution).

6. *Sixth Circuit*: *United States v. Hamilton*, 684 F.2d 380, 385 (6th Cir. 1982) (reversing, in part, counterfeiting convictions, explaining ". . . We find that the failure to give the instruction was plain error affecting substantial rights of the defendant. The proposed alibi instruction was a proper statement of the law and Hamilton clearly presented sufficient evidence to warrant the giving of such an instruction."); *United States*

v. McCall, 85 F.3d 1193, 1195-96 (6th Cir. 1996) (affirming where defendant never requested an alibi jury instruction (collecting authorities)).

7. *Eighth Circuit*: *Johnson v. Bennett*, 414 F.2d 50, 52-57 (8th Cir. 1969) (*en banc*) (opinion by Circuit Judge, later United States Supreme Court Justice Blackmun) (holding that defendant was entitled to an alibi instruction and shifting the burden of proving an alibi defense violated the Due Process Clause of the Fifth and Fourteenth Amendments); *United States v. Webster*, 769 F.2d 487, 490 (8th Cir. 1985) (finding that defendant was entitled to alibi theory-of-defense instruction, but failure to charge on alibi was harmless error under the circumstances of the case).

8. *Ninth Circuit*: *United States v. Zuniga*, 6 F.3d 569, 570-71 (9th Cir. 1993) (reversing bank robbery conviction where district court committed reversible error by refusing to instruct the jury on the defendant's alibi defense, noting ". . . To avoid this possibility, "[w]here alibi is the defense[,] a suitable *alibi* instruction *must be given when requested.*" *Id.* at 570) (emphasis in original); *United States v. Harston*, 64 F.3d 491, 493 (9th Cir. 1995) (reversing assault and firearm conviction where district court refused to instruct on alibi).[3]

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[3] Petitioner has reproduced in App. 20-22, *infra*, approved alibi-pattern jury instructions from the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh federal circuits. See also, Devitt, Blackmar, Wolff and O'Malley, *Federal Jury Practice and Instructions*, 4th ed. at § 19.07 (West. 1992), reviewing federal circuit authorities, *viz.*, alibi jury instructions.

As reproduced, *ante*, a sampling of federal circuit precedent clearly reveals that the accused may have a constitutional right to his or her theory-of-defense [jury] instruction.

C. THE MAJORITY OF STATE JURISDICTIONS HOLD THAT THE FAILURE TO GIVE AN ALIBI JURY INSTRUCTION IS PREJUDICIAL ERROR.

1. Alabama: *Brooks v. Alabama*, 380 So.2d 1012, 1014 (1980) (reversing burglary conviction for failure to give alibi instruction).

2. California: *California v. Ratliff*, 41 Cal.3d 675, 224 Cal.Rptr. 705, 715, 715 P.2d 665, 676 (1986) (same).

3. Colorado: *Colorado v. Nunez*, 841 P.2d 261 (Colo. Sup.Ct., 1992) (*en banc*) (trial court's failure to cooperate with the defendant to either correct tendered alibi instruction or to incorporate substance of alibi instruction into court's instruction was prejudicial error. *Id.* at 266-67 and nn. 11-13).

4. Florida: *Hudson v. Florida*, 381 So.2d 344, 345-46 (1980) (reversing robbery conviction where trial court declined to give defendant's requested alibi instruction); *Williams v. Florida*, 395 So.2d 1236, 1238 (Fla. 1981) (same).

5. Georgia: *Brown v. Georgia*, 122 Ga.App. 470, 177 S.E.2d 509 (1970) (it is error, even in the absence of request, to fail to charge on the law of alibi where this is the defendant's sole defense and was supported not only by his statement, but by the testimony of witnesses).

6. Indiana: *Jennings v. Indiana*, 514 N.E.2d 836, 837 (Ind. Sup.Ct., 1987) (reversing burglary and theft conviction based on flawed alibi instruction).

7. Iowa: *Iowa v. Stump*, 254 Io. 1181, 119 N.W.2d 210, 217 (Iowa Sup.Ct., 1963) (divided court affirmed second-degree murder conviction where alibi instruction placed burden of proof on defendant); vacated in *Johnson v. Bennett*, 414 F.2d 50 (8th Cir. 1969) (*en banc*) (Blackmun, J.).

8. Maryland: *Robertson v. Maryland*, 111 Md.App. 366, 685 A.2d 805, 812-13 (1996) (reversing first-degree murder where trial court failed to give specific alibi instruction).

9. Massachusetts: *Commonwealth v. Medina and Soto*, 404 N.E.2d 1228, 1236-37 (1980) (reversing as to Soto where trial court declined to charge the jury on Soto's alibi defense, but noting that in Massachusetts an alibi charge is discretionary with the trial court), *Commonwealth v. McLeod*, 367 Mass. 500, 502, n. 1, 316 N.E.2d 905, 906, n. 1 (1975) (reproducing model alibi instruction).

10. Michigan: *Michigan v. McGinnis*, 402 Mich. 343, 262 N.W.2d 669, 671 (Mich. Sup.Ct., 1978) (reversing rape and larceny for failure to give alibi-theory of defense instruction where evidence presented that defendant was elsewhere when the crime occurred).

11. Mississippi: *Holmes v. Mississippi*, 481 So.2d 319, 321 (Miss. 1985) (reversing burglary conviction for the failure to give alibi-theory of defense instruction).

12. Nebraska: *Nebraska v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1985) (rejecting relief predicated on trial court's declination to charge on alibi defenses).

13. Nevada: *Duckett v. Nevada*, 104 Nev. 6, 752 P.2d 752, 754-55 and n. 2 (1988) (we agree with the majority view and conclude that, when requested and supported, alibi instructions should be given, citing multiple state and federal authorities).

14. New York: *New York v. Jack*, 74 N.Y.2d 708, 541 N.E.2d 410-411 (C.A.N.Y. 1989) (affirming intermediate appellate conviction vacation where trial court refused counsel's request for alibi jury charge).

15. New Jersey: *New Jersey v. Searles*, 82 N.J. Supr. 210, 197 A.2d 384 (App.Div., 1964) (plain error not to charge the jury on alibi defense), but see *New Jersey v. Garvin*, 44 N.J. 268, 208 A.2d 402, 405-06 (1965) (questioning need for specific alibi instructions).

16. North Carolina: *North Carolina v. Hunt*, 283 N.C. 617, 197 S.E.2d 513, 515 (1973) (prejudicial error not to instruct on alibi where evidence warranted alibi instruction).

17. Ohio: *Ohio v. Bridgeman*, 51 Oh.App.2d 105, 366 N.E.2d 1378, 1389-90 (1977) (reversing aggravated murder ". . . We join those jurisdictions which recognize the duty of the court to instruct the jury upon the subject of alibi, with or without the request of counsel, where alibi is the defendant's sole defense and is supported by his testimony as well as by the testimony of other witnesses") (citing decisions from Tennessee, South Carolina, New Jersey, Georgia, Texas, and Kansas).

18. Oklahoma: *Trissell v. Oklahoma*, 737 P.2d 1228, 1229 (Okl. Cr., 1987) (. . . to entitle the defense to an alibi instruction the accused's proof must show that he could not have been at the place of the offense at the

time shown by the prosecution); *Goodwin v. State*, 654 P.2d 643, 655 (Okl.Crim.App. 1982) (same).

19. Pennsylvania: *Commonwealth of Pennsylvania v. Roxberry*, 529 Pa. 160, 602 A.2d 826, 827-28 (Pa. Sup.Ct., 1992) (affirming grant of new trial based on ineffective assistance of counsel in kidnapping and rape prosecution where defense counsel failed to tender alibi instruction to which defendant would have been entitled under Pennsylvania law); *Commonwealth v. Brunner*, 341 Pa. Super., 491 A.2d 150, 152-53 (1985) (same).

20. South Carolina: *South Carolina v. Bealin*, 201 S.C. 490, 23 S.E.2d 746, 756 (S.C. Sup.Ct. 1943) (murder conviction reversed where the trial court failed, *inter alia*, to instruct the jury on the law of alibi); *South Carolina v. Robbins*, 275 S.C. 373, 271 S.E.2d 319, 320 (1980) (same).

21. Tennessee: *Poe v. Tennessee*, 212 Tenn. 413, 420, 370 S.W.2d 488, 489-90 (1963) (reversible error where trial court failed to give alibi instruction, notwithstanding defense counsel's failure to request specific alibi charge); *Christian v. Tennessee*, 555 S.W.2d 863, 864 (Tenn. 1977) (same).

22. Texas: *Jones v. Texas*, 398 S.W.2d 753, 754 (Tex. 1966) (defendant entitled to specific alibi instruction); *contra Giesberg v. Texas*, 945 S.W.2d 120, Texas Ct. Crim.App., No. 696-97 (1998 WL 670415; 9/30/98) (divided court held defendant not entitled to special instruction on alibi defense); *cert. denied*, 119 S.Ct. 1044 (1999).

23. Washington: *Washington v. Pam*, 1 Wash. App. 723, 463 P.2d 200, 203 (1970) (alibi instruction not

fatally flawed where instruction included language that the defendant need not prove alibi beyond reasonable doubt, but clearly noting that defendant entitled to specific alibi instruction).

In the ensemble, twenty-one of twenty-three randomly selected jurisdictions hold that the trial court commits prejudicial error in failing to submit an alibi jury-instruction where warranted by [the] trial evidence.

D. THE STATE OF ILLINOIS AND ALIBI JURY INSTRUCTIONS.

In 1948, the Illinois Supreme Court held that the trial court committed reversible error in failing to instruct on alibi. In *People v. Scott*, 401 Ill. 80, 81 N.E.2d 426, 429-30 (1948), the court considered whether to vacate an indecent liberties conviction where the trial court refused defendant's alibi instruction. Chief Justice Fulton authored the unanimous reversing opinion, noting:

> We think under the proof, the refusal to give an instruction on the important issue of alibi might have been prejudicial to the defendant. The evidence offered to establish the alibi covered the entire period when the crime was alleged to have been perpetrated. We are not called upon to judge the weight of the evidence upon this question, as very slight evidence upon a given theory of a case will justify the giving of an instruction.

81 N.E.2d at 429 (supporting authorities and quotation marks omitted)

The Illinois Supreme Court again reviewed alibi instructions in *People v. Pearson*, 19 Ill.2d 609, 169 N.E.

2d 252, 255-56 (1960). While affirming *Pearson*'s rape conviction, the court nonetheless approved the alibi instruction given by the trial court. *Id.* at 254-55 (reproducing alibi instructions). However, in 1968, an Illinois committee on pattern jury instructions "recommended" that the trial courts refrain from giving alibi jury instructions. After 1968, Illinois trial courts declined to charge on an alibi defense, irrespective of the evidence. Post-I.P.I., the Illinois Supreme Court affirmed burglary and theft convictions in *People v. Poe*, 48 Ill.2d 506, 272 N.E.2d 28 (1971). While affirming, the Court noted that *Poe's* alibi instructions (non-I.P.I.) were not "impartial and free from argument," 272 N.E. 2d at 31. Justice Ryan went on to explain that the I.P.I. committee "*recommends*" that no instruction be given because alibi is not an affirmative defense, 272 N.E.2d at 31-32. The "recommendation" has been perpetuated in the 1992 I.P.I. § 24-25.05 (3rd ed., 1992); (The Committee *recommends* that no instruction be given on this subject; pg. 314).[4]

There is an immense distinction between making a "recommendation" and a rule of law. To recommend is to advise, encourage, urge, or suggest. Petitioner contends that his Fifth, Sixth and Fourteenth Amendment protections ought not be emasculated by virtue of a committee "recommendation," *viz.*, an essential alibi jury instruction.

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[4] The committee alibi instruction "recommendations" appearing in the 1968 and 1992 Illinois Pattern Jury publications are reproduced at App. 23.

E. THE CIRCUITS ARE DIVIDED ON THE QUESTION OF WHETHER THE FAILURE TO PROVIDE AN ALIBI DEFENSE RISES TO THE LEVEL OF FEDERAL CONSTITUTIONAL ERROR.

The Fourth Circuit, in *United States v. Hicks*, 748 F.2d 854, 857-58 (4th Cir. 1984), held that the failure to provide an alibi instruction rose to the level of federal constitutional error in that the defendant had a ". . . Sixth Amendment and due process right to have that [alibi] issue submitted to the jury" and the failure to do so was "[thus] an error of constitutional magnitude."

Justice Blackmun, while a circuit judge, wrote the *en banc* decision in *Johnson v. Bennett*, 414 F.2d 50, 52-57 (8th Cir. 1969), explaining that within the fabric of an alibi instruction, shifting the burden of proving the alibi defense to the defendant was violative of the Due Process Clause under the Fifth and Fourteenth Amendments.

The Seventh Circuit, in *United States v. Douglas*, 818 F.2d 1317, 1319 (7th Cir. 1987), held that the Fifth Amendment applied to a situation where the district court refused to provide the jury with the defendant's theory of the case ("We conclude that the defendants' *Fifth Amendment* right to have the jury consider their theory of defense was violated in this case, because even though the record shows that the defendants' theory of defense at trial was that they were mere purchasers from one conspiracy, the trial court, relying on the pattern jury instructions, did not instruct the jury on this theory").

In *United States v. Simon*, 995 F.2d 1236, 1244-45 (3rd Cir. 1993), the court noted that the Third Circuit

holds that the failure to provide an alibi instruction is *non-constitutional error* . . . [but] ". . . we recognize that the improper alibi instruction also may be construed as "constitutional" error, to the extent that it suggests that the accused bears a burden of persuasion on the alibi defense" (citing, *inter alia*, *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 1892 (1991).[5]

In *Duckett v. Godinez*, 67 F.3d 734, 744-45 (9th Cir. 1995), the court affirmed the denial of § 2254 relief where the primary § 2254 issue related to the trial court's refusal to charge the jury on *Duckett's* alibi defense. The court noted that the Second, Third, Fourth, Fifth and Ninth Circuits hold in cases arising on direct appeal from a federal district court that it is always reversible error not to instruct on an alibi defense where specifically requested and there is some evidence in the record supporting the instruction. *Id.* at 745 (collecting cases). The affirming panel further noted that the Second and Fifth Circuits have not indicated whether the failure to instruct on an alibi defense is constitutional error and only the Fourth Circuit has directly implicated the failure to instruct as "an error of constitutional magnitude," citing *United States v. Hicks*, 748 F.2d at 858 (4th Cir. 1984).

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[5] It seems constitutionally ironic to suggest that the failure to give an alibi instruction is non-constitutional error, but providing a burden-shifting flawed alibi instruction *may* rise to the level of constitutional error.

In *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995), the Court found constitutional error in the trial court's failure to submit the question of materiality to the jury within the context of a prosecution under 18 U.S.C. § 1001. Justice Scalia's opinion explained:

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 278, 113 S.Ct. 2078, 2080-2081, 124 L.Ed.2d 182 (1993).

515 U.S. at 509-10, n. 1 omitted.

Chief Justice Rehnquist wrote a concurring opinion which noted:

> Federal and state legislators may reallocate burdens of proof by labeling elements as affirmative defenses . . . .

515 U.S. at 525 (supporting citations omitted; Justices O'Connor and Breyer joined in the concurring opinion).

Under Illinois law, an "affirmative defense" means that unless the State's evidence raises the issue involving the alleged offense, the defendant, to raise the issue, must present some evidence thereon. Once the issue is raised, then the State must sustain the burden of proving the defendant guilty beyond a reasonable

doubt as to that issue together with all the other elements of the offense.[6]

The State of Illinois has clearly marked "alibi" as an affirmative defense—that is, unless the defendant presents "some evidence thereon" the issue is not raised for jury consideration. But the petitioner presented substantial alibi evidence, and was deprived of a crucial alibi jury instruction, not because the Illinois legislature "reallocated [a] burden of proof by labeling elements as affirmative defenses" (per Chief Justice Rehnquist's *Gaudin* concurrence)—but, rather, because [the] Committee on Illinois Pattern Jury Instructions in 1968 "recommended" that no alibi instruction be afforded a criminal defendant in the State of Illinois (App. 23, *infra*).

In *Duckett v. Godinez*, *supra*, the court explained why a specific alibi instruction is crucial:

> We have warned that instructions on the presumption of innocence, the government's burden of proving every element of the crime beyond a reasonable doubt, and the identification of the defendant as the perpetrator of the charged crime are not adequate substitutes for a specific alibi instruction * * * in *Zuniga*, we said that [a]n alibi instruction is critical because, without it, there is a danger that the jury may interpret the defendant's failure to prove his alibi as proof of guilt.

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[6] The sole exception relates to [an] insanity defense which is inapposite to this petition, cf., 720 ILCS 5/3-2(b) (App. 24).

67 F.3d 743-44 (9th Cir. 1995) (internal authorities and quotation marks omitted).[7]

Petitioner's entire case rested on *identification versus alibi*. The prosecution presented no weapon, no fingerprint evidence, no accomplice testimony and no post-arrest statement or confession from the petitioner. Not a single prosecution witness gave a contemporary description of the offender to the police on April 15, 1989. Petitioner's specific request for a concise alibi instruction was refused.[8] The Court has ruled that arguments of counsel are no substitute for jury instructions.[9]

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[7] In *United States v. Booz*, 451 F.2d 719, 723 (3rd Cir. 1971), *cert. denied*, 414 U.S. 820, 94 S.Ct. 45 (1973), the Court similarly explained the need for a specific alibi instruction ("We require such a specific instruction regarding an alibi defense because "the jury is likely to become confused about the burden of proof when an appellant offers this type of evidence.").

[8] Evidence has been introduced that the defendant was not present at the time and place where the crime charged in the indictment is alleged to have been committed. The government has the burden of establishing beyond a reasonable doubt the defendant's presence at that time and place.

Seventh Circuit Pattern Instruction, § 4.03 (1980) (Org.Rec. C-136).

[9] *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936 (1978) (But arguments of counsel cannot substitute for instructions by the court).

CONCLUSION

This case squarely presents the issue of whether the failure to instruct the jury regarding an alibi defense can rise to the level of constitutional error where, as here, there was persuasive alibi evidence comprising petitioner's singular defense. The Fourth Circuit holds that the failure to provide a specific alibi jury instruction rises to the level of Fifth and Sixth Amendment error. The Third Circuit has held otherwise, and the Second and Fifth Circuits have not taken a [constitutional] position. This Court has not spoken to the issue presented.

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, First District, in this cause.

Respectfully submitted,

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INDEX TO APPENDIX

	APP. PAGE
Opinion Below	1
Ill.Sup.Ct Order denying Petition for Leave to Appeal	19
Alibi-pattern jury instructions from the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh federal circuits	20
Illinois Pattern Jury Instruction Committee Comments	23
Illinois affirmative defenses, 720 ILCS 5/3-2, (eff. Jan. 1, 1984) (West. 1995)	24

Third Division
[June 17, 1998]

NOTICE The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-92-0117

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 89CR3581
SAM REHDER,	)	Honorable Howard T. Savage and Mary Jane Theis, Judges Presiding.
Defendant-Appellant.	)	

ORDER

A jury found defendant Sam Rehder guilt of first degree murder (Ill. Rev. Stat. 988, ch. 38, par. 9-1) in September 1991, and defendant was sentenced to 45 years' imprisonment in the Illinois Department of Corrections. He now appeals, arguing: (1) he was not proven guilty beyond a reasonable doubt; (2) the trial court committed reversible error in refusing to instruct the jury on his alibi defense; and (3) he was denied a

fair trial by the prosecutor's references to facts not in evidence during closing argument.

The evidence at trial revealed the following. On the night of April 15, 1989, the victim, 19-year-old Anthony Logan, was standing with some 15 to 25 other black youths on the corner of Lexington and Kostner in Chicago. Some members of the crowd were gang members while others were not. Logan was not a member of a gang, nor was Richard Reed, Logan's friend who was also standing on the corner that night. Two members of the Black Souls gang, Michael Drye and Ellery Johns, were among the group as well.

Traffic at the intersection had slowed down around 10:15 p.m. due to road construction near the intersection. Two carloads of individuals approached the intersection flashing Latin Kings gang signs. The Latin Kings and Black Souls are rival gangs. One car left the area before any confrontation occurred. The second car was described as a two-door, gray Beretta with black molding along the side.

An individual later identified as defendant pulled the Beretta into the middle of the road in front of the construction site and stopped the car. Defendant, a Caucasian, stood next to his car and began yelling racial slurs at the crowd of black youths gathered on the corner. Defendant was approximately 20 feet away from the crowd.

As the group of black youths were yelling back at defendant, Ronald Benson, a Black Gangster Disciple, parked his car near defendant and encouraged him to move on. He heard defendant repeatedly saying "fuck you, niggers" while flashing the Latin Kings gang sign.

Benson told defendant to take it easy and told the black youths on the corner to "chill" out. Benson was about 10 feet away from defendant. He told defendant the group on the corner did not want any trouble. Defendant then stated to Benson, "fuck you too, nigger" and continued taunting the black youths on the corner.

Four of the youths on the corner threw bottles over defendant as he stood by his car. There was conflicting testimony as to whether defendant's car was hit. Defendant continued yelling and then reached into his car and pulled a .38-caliber gun from beneath the seat. At this point the crowd scattered. Benson and Drye hid behind a van parked on the street while Johns ran around the corner. Logan's friend Reed saw defendant fire the gun, get back into the Beretta, and drive off. Logan was killed by a single gunshot wound to the chest.

A little over a month later, on May 23, 1989, Johns stopped at a gas station at Independence and Harrison in Chicago. At that time, he noticed defendant standing at a telephone by the street. He also recognized the gray Beretta driven by defendant on the night of the shooting. He drove closer to the telephone and got a better look at defendant. Johns then searched his ashtray for change to call the police. Unable to find change, he backed up and hailed a passing police car. He informed the officers that the person who had shot Logan was sitting in the driver's seat of the gray Beretta parked by the telephone.

Detectives Robert Prawiec and William Pavlik parked their car directly in front of the Beretta. Prawiec was familiar with the shooting and the description of the

offender and his vehicle. The offender had been described as a 5'7" to 5'8" male Hispanic with a slender build. Defendant's arrest report described him as 5'8", 130 pounds, with brown eyes, black hair, and a medium complexion. The detectives also knew the offender drove a two-door, gray Beretta with black molding along the side.

The detectives asked defendant to step out of his vehicle. Johns ran up behind the officers and identified defendant and the gray Beretta. Defendant was then arrested. On May 23, 1989, Reed, Drye, and Benson, in separate lineups, all positively identified defendant as the person who shot Logan.

Defendant presented evidence at trial of an alibi. Defendant's mother, brother, sister, and uncle all testified defendant was home on the night in question. According to these defense witnesses, the Rehder family was home doing their taxes on April 15. Defendant allegedly played Nintendo while his mother did his taxes for him.

Following the close of all the evidence, the jury convicted defendant of the first degree murder of Logan. The trial court sentenced defendant to 45 years' imprisonment in the Illinois Department of Corrections. This appeal followed.

Defendant first attacks the sufficiency of the evidence in this case. We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *People v. Gilliam*, 172 Ill.2d 484, 515, 670 N.E.2d 606 (1996). Where a criminal conviction is challenged based on insufficient evidence, a reviewing court must consider all of the evidence in the light most fa-

vorable to the prosecution and determine whether any rational fact finder could have found beyond a reasonable doubt the essential elements of the crime. *Gilliam*, 172 Ill.2d at 515. It is the function of the jury to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *Gilliam*, 172 Ill.2d at 515.

Defendant makes a broad attack on the reliability of eyewitness identifications. However, it is well established in Illinois that identification of the accused by a single eyewitness is sufficient to sustain a conviction, provided that the witness viewed the accused under circumstances permitting a positive identification. *People v. Johnson*, 114 Ill.2d 170, 188, 499 N.E.2d 1355 (1986). Defendant in this case was identified by not just one but four eyewitnesses to the murder, three of whom identified defendant in separate lineups.

Moreover, we find the circumstances surrounding the view of defendant conducive to trustworthy identifications, despite defendant's protestations to the contrary. Factors to consider in judging the reliability of an identification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *People v. Simpson*, 172 Ill.2d 117, 141, 665 N.E.2d 1228 (1996). Defendant asserts there was only a "fleeting opportunity" for witnesses to identify the shooter in this case. We disagree. This was not a drive-by shooting; there was a protracted encounter between a gunman and a crowd of people. Defendant had sufficient time to

park his car, exit, and repeatedly taunt the individuals standing on the street corner. There was sufficient time for Benson to park his car near defendant's, exit his vehicle, and try to diffuse the situation by talking to both defendant and the group he was taunting. There was also sufficient time for several of those being taunted to pick up bottles and throw them in defendant's direction prior to defendant reaching into his car for his gun. In short, we do not view this encounter as "fleeting."

Several other factors suggest the four eyewitnesses' identifications in this case were reliable. All four had favorable opportunities to view defendant. Defendant exited his car and stood approximately 20 feet away from Reed, Drye, and Johns on the street corner. Defendant undoubtedly had the undivided attention of all three as he stood by his car shouting racial slurs at the group. Benson had an even better view of defendant. He stood approximately 10 feet away from defendant. Further, his attention was fixed on defendant as he had a conversation with him in which he encouraged defendant to leave the area. Johns was able to identify defendant on the street a month after the shooting, and Reed, Drye, and Benson all identified defendant from separate lineups five weeks after the shooting. In addition, the description of the shooter approximated the physical description of defendant recorded in his arrest report.

Defendant argues the identifications were unreliable due to the lighting conditions on the night of April 15, 1989. Defendant refers to the lighting that night as "questionable." However, none of the State's witnesses at trial suggested the lighting was poor on the night of

the shooting. To the contrary, the testimony at trial indicated the exact opposite—that defendant was in a well-lit area when he fired into the crowd. At least two witnesses testified defendant parked his Beretta directly underneath a street light. Drye testified "it was very bright because [defendant] was right up under the street light on Kostner. All the street lights is [*sic*] bright." This testimony was consistent with Benson's, who testified the lighting conditions were "pretty good," noting "They got bright [street] lights on Kostner."

Defendant next attacks the credibility of the State's identification witnesses, referring to the "cadre of prosecution witnesses" as "gang member-felons." He points out Drye, Johns, and Benson were all members of gangs opposed to defendant's gang, the Latin Kings. Defendant suggests both Drye and Benson expected some consideration from the State on pending charges in exchange for their testimony. Even assuming all of this to be true, one of the eyewitnesses, Reed, had no criminal background or gang affiliation, and he also identified defendant. The record further reveals that Drye had been arrested only days before trial and had not been promised anything in exchange for his testimony, testimony which he had previously agreed to give. Defendant points to nothing in the record which suggests Benson expected leniency on his pending charges in return for his testimony, and, in fact, Benson testified to the exact opposite.

Defendant contends his conviction cannot be sustained on the basis of eyewitness identifications where he presented "uncontroverted" evidence of an alibi. However, in both cases cited by defendant in support of his assertion, *People v. Nellons*, 130 Ill.App.3d 908, 475

N.E.2d 208 (1984) and *People v. Gardner*, 35 Ill.2d 564, 221 N.E.2d 232 (1966), the court reversed convictions based solely upon the uncorroborated identification testimony of a single witness in the face of unbiased evidence of an alibi. Neither of these conditions was present in this case. Four eyewitnesses to the shooting contradicted defendant's alibi by placing him at the scene of the murder in a Beretta with a gun, rather than home with his family playing Nintendo. Not only did each witness' identification of defendant corroborate the identifications by the others, but there was further corroboration as well. Significantly, defendant was spotted by Johns on the street in a automobile matching the description of the gunman's car given by witnesses to the shooting (a silver, two-door Beretta with black molding along the side). Linking defendant to the car used in the shooting and described with such detail by witnesses takes this case out of that class of cases where convictions are obtained solely on the basis of identification testimony.

Nor was defendant's alibi particularly strong or believable, in contrast to both *Nellons* and *Gardner*. Defendant's alibi witnesses were all family members, with an obvious bias in favor of defendant. Compare *Nellons*, 130 Ill.App.3d at 913-14 (co-workers as alibi witnesses) and *Gardner*, 35 Ill.2d at 572-73 (manager of a movie theater as alibi witness). Evidence of that bias emerged during the testimony of Detective Diciolla. Detective Diciolla testified for the State that he and two assistant State's Attorneys attempted to interview defendant's uncle, Archie Jones, at his residence prior to trial. As the three stood outside Jones' door, Jones stated he was only a character witness for defendant, called the men

"assholes," accused them of framing another of his nephews, and then slammed the door in their faces. In sum, defendant's identification by multiple witnesses was corroborated (via the gray Beretta), the testimony of his family members was suspect, and the jury could reasonably have found defendant guilty of murder beyond a reasonable doubt.

Defendant next contends the trial court erred in refusing to give the jury an instruction on his alibi defense. However, an alibi is not an affirmative defense, and the giving of alibi instructions in Illinois is not recommended, according to the committee comments to Illinois Pattern Jury Instructions, Criminal No. 24-25.05 (2d ed. 1981). See *People v. Poe*, 48 Ill.2d 506, 511-12, 272 N.E.2d 28 (1971); *People v. Spain*, 285 Ill.App.3d 228, 238, 673 N.E.2d 414 (1996); *People v. Daniels*, 272 Ill.App.3d 325, 347, 650 N.E.2d 224 (1994); *People v. Brandon*, 197 Ill.App.3d 866, 884, 557 N.E.2d 1264 (1990). The committee recommends no alibi instruction should be given because of its view that instructions should avoid commenting on particular types of evidence. *Poe*, 48 Ill.2d at 512, *Spain*, 285 Ill.App.3d at 238; *Brandon*, 197 Ill.App.3d at 884. While, as defendant points out, the committee's comments do not amount to a rule of law, we can hardly fault the trial court in this case for following a recommendation of the IPI committee which has been repeatedly followed by Illinois courts. See *Poe*, 48 Ill.2d at 511-12; *Daniels*, 272 Ill.App.3d at 347; *Brandon*, 197 Ill.App.3d at 884. See generally, *People v. Pearson*, 19 Ill.2d 609, 612-15, 169 N.E.2d 252 (1960) (discussing the "extraordinary difficulties" and "confusion" caused by instructions on an alibi defense). Defendant does offer a scholarly discus-

sion of federal cases in support of his position, none of which help his cause in this jurisdiction.

Defendant's final assignment of error relates to the prosecution's closing argument, about which defendant has a number of complaints. First, defendant complains about "racial references" made by the prosecutor in closing argument, suggesting the prosecutor was "playing a racial trump card." He refers to the following passages which occurred during rebuttal:

> "MR. SMITH [Assistant State's Attorney]: Mr. Volbe [defense counsel] also makes comment about people that were on that corner [where the shooting occurred]. Well, not everyone had the chance to grow up in Kenilworth. Not everyone had the chance to go to high school and college. What he's saying to you in essence is if you come from a neighborhood where you're not—
>
> ***
>
> A reasonable inference from what Mr. Volbe told you is that because these people are out on that corner, they belong in a gang because they don't get to grow up in the best environment that they cannot be believed and cannot be injured. You might as well get shot in a poor neighborhood where somebody doesn't have the best background."

While we agree with the numerous federal decisions cited by defendant condemning racially inflammatory remarks in closing arguments, we fail to see how the prosecutor's defense of his own witnesses' character here in any way touched upon racial issues. It is clear from the record the prosecutor was merely responding to an attack upon his witnesses by defense counsel dur-

ing closing. Defense counsel, in a reference to Benson, told the jury, "You had a moron up here who's 27 years old wearing his jump suit from the jail who's a Quadruple Maniac ***." Counsel then referred to Johns as an "idiot" and "a piece of garbage." The credibility of Drye was also attacked. The prosecution's comments in rebuttal made the simple point that the State's witnesses should not be disbelieved merely because several were gang members with prior felonies; gang members are naturally the most common witnesses to gang violence.

Defendant next argues he was denied a fair trial in light of the prosecutor's comment that he was there "to sell justice," suggesting the prosecutor abandoned his responsibilities as a public prosecutor in so doing. In attacking the prosecution on this point, however, defendant completely disregards the context in which this remark was made. The prosecutor made this remark in rebuttal following lengthy and repeated accusations by defense counsel in closing that the prosecution witnesses were "selling testimony."

> "MR. VOLBE: [Defendant] didn't choose [the witnesses against him]. [The prosecution] chose [defendant], and they tried to sell them to you, and you know what one of the prices of reasonable doubt is. Here's what it is. When you're a lawyer, and you put on a witness, you're trying to sell that witness. The witness tries to sell himself. You, as a lawyer, try to sell the witness. They want you to buy it. The price you pay is your belief beyond a reasonable doubt.
>
> Now, how much would you want to pay for Michael Drye's testimony: How much would you like to pay for Ellery Johns' testimony? Would

you like to be convicted based on the testimony of Michael Drye—

MR. KREJCI [Assistant State's Attorney]: Objection.

THE COURT: Sustained.

***

MR. VOLBE: Let's put it this way. How much do you want to pay for it? Would you believe Michael Drye beyond a reasonable doubt if he says he's going to take out your daughter and he will have her home on time?

MR. SMITH: Objection.

MR. VOLBE: Would you believe Ellery Johns beyond a reasonable doubt? He says, 'Here is this cute diamond ring I got. It's worth $2,000, and no, it's not stolen' *** We have a situation where the State having put on—selling Mr. Drye's testimony, selling [Johns'] testimony, selling this one's testimony, selling that one's testimony, ran out of sales pitches *** They ran out of sales pitches, and didn't bring forth any one of the five—other five to ten or twenty-five to thirty, depending on how much you want to pay for whoever you want to believe, that that's what we're talking about here, you paying the price, he paying [sic] the ultimate price, purchasing that garbage.

***

They also didn't try to sell you [Michael Drye's brother] Norman [a prosecution witness who was apparently unavailable for trial], who might not be available because he might be at a convention in Atlanta of the Insane Maniac mother killers or something like that."

In rebuttal, the prosecutor responded:

> "MR. SMITH: *** [The prosecution witnesses] had a reason [for testifying] because they wanted to see the person that murdered their friend pay for it, and that's why they came forward. There's been no deals cut. That's ridiculous. It's degrading. We're here to sell witnesses, that's degrading, it's untrue, and it's a lie. Some people are here to sell justice. That's the bottom line, and that's why we're here."

We see nothing improper about the prosecution's brief response to defense counsel's argument during closing.

Defendant further complains the prosecution impermissibly inflamed the passions of the jury with the following comments made during rebuttal:

> "MR. SMITH: I'd like to talk to you for a second. Mr. Volbe has made several time [*sic*] putting his hand on Mr. Rehder's shoulders. That's called sympathy, and that's a ploy, a ploy to have you feel sorry for him because he's a kid. Well, he ain't a kid. He said it's a privilege for him to represent him. Well, I would like to introduce Anthony Logan [the victim], and it's a privilege for us, Mr. Krejci and I to represent him. We're asking you to avenge his death and putting the murder [*sic*] in jail."

We do not believe the above comments amount to reversible error. The trial judge immediately sustained defense counsel's objection to these comments. Moreover, the case primarily relied upon the defendant in support of his argument on this point, *People v. Rivera*, 277 Ill.App.3d 811, 661 N.E.2d 429 (1996), is distinguishable from the present case. In *Rivera*, the prosecutor suggested in closing that his main witness should

be believed because he was risking his life by testifying against a Latin King, an implication without basis in the record. In light of this "highly prejudicial and inflammatory" remark, as well as improper hearsay evidence establishing defendant's identity as the perpetrator, the *Rivera* court concluded the evidence was closely balanced and granted a new trial. *Rivera*, 277 Ill.App. 3d at 821-22; see also *People v. Aquirre*, ___ Ill.App.3d ___, 684 N.E.2d 1372 (1997) (granting a new trial due to prosecutorial misconduct where evidence was closely balanced). Here, in contrast, the prosecutor's comment was not "highly prejudicial and inflammatory," and the evidence was not closely balanced. Defendant was identified as the perpetrator by four separate witnesses under conditions conducive to trustworthy identifications, and he was arrested sitting in the very car described as that driven by the shooter.

Defendant's final complaint about the prosecution's closing argument is more problematic. He argues the State's references in closing argument to facts not in evidence warrant a new trial. Specifically, he first points to the reference to a license plate, which the trial court had earlier excluded, found in defendant's trunk. Detective Prawiec had testified a license plate registered to a male Hispanic, James Gomez, was found in the trunk of the Beretta following defendant's arrest. An objection to this testimony was made by defense counsel, and the trial judge, after noting the tardiness of the objection, nevertheless sustained the objection and ordered the testimony stricken. The trial judge later permitted testimony that the license plate found in the trunk did not match the plate on the car but soon thereafter reversed himself. The prosecutor in

closing asked "why would you have somebody else's license plate in your trunk?" While we agree with defendant that the prosecutor's comment was blatantly improper, we do not believe this isolated comment warrants a new trial. Defense counsel's objection to the remark was immediately sustained, and the trial court then instructed the jury to disregard statements not based upon evidence in the record.

Defendant also points to the prosecution's reference in closing to the fact that the federal income tax deadline was not April 15 in 1989. Earlier in the trial, the State had attempted to discredit defendant's alibi by establishing that, since April 15, 1989, fell on a Saturday, the actual deadline for filing one's taxes was April 17. The trial judge refused to permit the State to submit proof on the issue. He reasoned the actual date taxes were due was irrelevant to the truth of defendant's alibi, since all that mattered was what each witness believed to be the date taxes were due that year. The prosecutor made two references to the tax deadline in closing argument. In light of the earlier rulings of the trial court, these remarks were, again, clearly improper. However, we do not believe they justify a new trial. As before, the trial court sustained defendant's objection to the offending remarks and cautioned the jury to consider only evidence in the record. We think it fair to conclude the jury, like the trial judge, recognized the irrelevancy of the federal tax filing deadline.

We believe this case is distinguishable from *People v. Aquirre*, 281 Ill.App.3d 1028, 684 N.E.2d 1372 (1997), which defendant has cited as supplemental authority. The prosecutor in *Aquirre* had flatly asserted fabrica-

tion of a defense by defense counsel. She repeatedly asked improper questions which assumed facts not in evidence, and she asked other questions which were "loaded." The prosecutor also elicited testimony suggesting defendant was in a gang, in violation of a motion *in limine*. The *Aquirre* court, with one judge dissenting, found the cumulative impact of these numerous occurrences of prosecutorial misconduct justified a new trial. *Aquirre*, 291 Ill.App.3d at 1035-36. We note, however, the court in *Aquirre* found the evidence to be closely balanced, in contrast to the present case. See *Aquirre*, 291 Ill.App.3d at 1035. For this reason, we find *Aquirre* distinguishable.

People v. Witted, 79 Ill.App.3d 156, 398 N.E.2d 68 (1979), and *People v. Hovanec*, 40 Ill.App.3d 15, 351 N.E.2d 402 (1976), also cited by defendant as supplemental authority, are likewise distinguishable. The only evidence against the defendant in *Witted* was the uncorroborated identification of the defendant by the victim. The prosecutor in *Witted* insinuated to the jury that the trial judge had, at an earlier hearing, conclusively determined defendant's identity as the offender. *Witted*, 79 Ill.App.3d at 166-67. The prosecutor went on to suggest to the jury that the defense witnesses perjured themselves at defense counsel's request, and he further implied that the defendant had a criminal background which defense counsel was hiding from the jury. The trial judge failed to sufficiently rule on defendant's objections to these comments and failed to admonish the jury to disregard the comments. *Witted*, 79 Ill. App.3d at 167-68. In contrast to *Witted*, the evidence against defendant in this case was overwhelming, the evidence upon which the prosecutor improperly com-

mented was generally irrelevant to the State's case, and the trial court admonished the jury repeatedly.

In *Hovanec*, the prosecutor, in the presence of the jury, repeatedly offered to stipulate to a pretrial statement by a co-defendant. The appellate court in *Hovanec* condemned this conduct, noting "the practice of one litigant offering evidence or offering to stipulate to evidence in the presence of the jury, thereby forcing the opponent to object or allow its admission or else to appear to be hiding something unfavorable from the jury has been repeatedly condemned." *Hovanec*, 40 Ill. App.3d at 17. The prosecutor in *Hovanec* also made numerous remarks to the jury suggesting that the jury was not allowed to hear certain evidence because of defendant objections. In addition, other improper statements were made by the prosecutor during closing argument, including an accusation that the defense counsel had deliberately tried to mislead the jury and that defendant had been a well-coached witness who engaged in theatrics on the stand. *Hovanec*, 40 Ill. App.3d at 18. As with *Aquirre* and *Witted*, *Hovanec* is easily distinguished from the present case.

That is not to say we condone the conduct of the State in closing argument in this case. The State twice disregarded earlier, specific rulings of the trial court and made references to facts not in evidence. The trial judge, however, acted in response to the possibility of prejudice by sustaining defense counsel's objections and instructing the jury to limit itself to consideration of evidence in the record on at least six different occasions. (The trial court similarly had to instruct the jury regarding consideration of evidence not in the record at

least five times during defense counsel's closing argument.) Had the evidence in this case been closely balanced, we might have been more inclined to grant defendant a new trial based upon the prosecution's comments in closing argument.

For the foregoing reasons, the judgement of the trial court is affirmed.

LEAVITT, P.J., with GORDON and CAHILL, JJ., concurring.

(Letterhead of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
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February 3, 1999

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2000 N. Clifton
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No. 86525 – People State of Illinois, respondent, v. Sam Rehder, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1999.

Fifth Circuit

ALIBI

"Evidence has been introduced tending to establish an alibi—that the defendant was not present at the time when, or at the place where, the defendant is alleged to have committed the offense charged in the indictment.

It is, of course, the Government's burden to establish beyond a reasonable doubt each of the essential elements of the offense, including the involvement of the defendant; and if, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the defendant was present at the time and/or place as alleged in the indictment, you must acquit the defendant."

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 1.34 (1990).

Sixth Circuit

ALIBI

"(1) One of the questions in this case is whether the defendant was present _____

_____.

(2) The government has the burden of proving that the defendant was present at that time and place. Unless the government proves this beyond a reasonable doubt, you must find the defendant not guilty."

Pattern Criminal Jury Instructions of the District Judges Association of the Sixth Circuit, Instruction No. 6.02 (1991).

Seventh Circuit

ALIBI

"Evidence has been introduced that the defendant was not present at the time and place where the crime charged in the indictment is alleged to have been committed. The government has the burden of establishing beyond a reasonable doubt the defendant's presence at that time and place."

Federal Criminal Jury Instructions of the Seventh Circuit, Instruction No. 4.03 (1980).

Eighth Circuit

ALIBI

"One of the issues in this case is whether defendant was present at the time and place of the alleged crime. If, after considering all the evidence, you have a reasonable doubt that defendant was present, then you must find [him] [her] not guilty."

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 9.07 (1992).

Ninth Circuit

ALIBI

"The defendant has introduced evidence to show that he was not present at the time and place of the commission of the offense charged in the indictment. The government has the burden of establishing beyond a reasonable doubt the defendant's presence at that time and place.

> If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find the defendant not guilty."

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 6.01 (1992).

Eleventh Circuit

ALIBI

> "Evidence has been introduced tending to establish an alibi—that the Defendant was not present at the time when, or at the place where, he is alleged to have committed the offense charged in the indictment.
>
> It is, of course, the Government's burden to establish beyond a reasonable doubt each of the essential elements of the offense, including the involvement of the Defendant; and if, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the Defendant was present at the time and place as alleged in the indictment, you must find him not guilty."

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Criminal Cases, Special Instruction No. 10 (1985).

24.05

The Committee recommends that no instruction be given on this subject.

Committee Note

Alibi is not an affirmative defense. *People v. Pearson*, 19 Ill.2d 609, 614, 169 N.E.2d 252, 255 (1960). Criminal Code, Section 3-2.

The jury should not be instructed that the alibi must cover the entire time of the crime. *People v. Johnson*, 23 Ill.2d 465, 468-70, 178 N.E.2d 878, 879-880 (1961), cert. den. 371 U.S. 881, 83 S.Ct. 153, 9 L.Ed.2d 117.

The decision to not instruct on this subject is based upon the policy of the Committee that instructions should avoid commenting on particular types of evidence.

24-25.05

Committee Note

The Committee recommends that no instruction be given on this subject.

Alibi is not an affirmative defense, *People v. Pearson*, 19 Ill.2d 609, 169 N.E.2d 252 (1960); *People v. Shelton*, 33 Ill.App.3d 871, 338 N.E.2d 585 (3rd Dist. 1975). See Chapter 38, Section 3-2.

The Committee decided to omit instructions on this subject because of its view that instructions should avoid commenting on particular types of evidence. See *People v. Poe*, 48 Ill.2d 506, 272 N.E.2d 28 (1971). See also *People v. Therriault*, 42 Ill.App.3d 876, 356 N.E.2d 999, 1 Ill.Dec. 717 (1st Dist. 1976).

720 ILCS 5/3-2. Affirmative Defense

§ 3-2. Affirmative defense. (a) "Affirmative defense," means that unless the State's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon.

(b) If the issue involved in an affirmative defense, other than insanity, is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense. If the affirmative defense of insanity is raised, the defendant bears the burden of proving by a preponderance of evidence his insanity at the time of the offense.

Laws 1991, p. 1983, § 3-2, eff. Jan. 1, 1962. Amended by P.A. 83-288, § 1, eff. Jan. 1, 1984.

Formerly Ill.Rev.Stat. 1991, ch. 38, ¶ 3-2.